
9 Constitutional Culture and Democracy in Mexico

A CRITICAL VIEW OF THE 100-YEAR-OLD MEXICAN CONSTITUTION

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Introduction

Last year the Mexican Constitution turned 100 years old. The centenary could make us think that in Mexico we have a strong constitutional culture. However, this assumption is wrong, since the strength of a constitutional culture does not depend on the longevity of the Constitution. Constitutional culture is an open and incomplete project of learning, understanding, and interpreting the constitution by the people in a non-legalistic way.¹ From this perspective, Mexican constitutional culture is very weak. Constitutionalism in Mexico may not be in a crisis, understood as an acute period of serious difficulty, but it is suffering from a chronic illness of long standing.

The 1917 Mexican Constitution marked the end of the Mexican Revolution and the beginning of a new era. In the aftermath, a continuous confrontation between revolutionary leaders took place, leading in 1929 to the foundation of the *Partido Nacional Revolucionario*, predecessor of the Partido Revolucionario Institucional (PRI). Afterward came the stabilization of the regime and predominance of one political party for the next seventy years. Since 1977, electoral competition has slowly opened to opposition by legal and constitutional amendments to include representatives elected by proportional

¹ Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007), 57, 61.

representation. With this legal change, Mexico moved to a pluri-party system. In 1989 the right-wing party Partido Acción Nacional (PAN) won its first gubernatorial election, and in 1997 PRI lost control of Congress. Three years later, PAN won the presidency. After twelve years of PAN's government, the PRI returned to Los Pinos, the presidential palace. With the return of the PRI to the presidency, there has been an authoritarian backlash in the country.

In 2006, Zamora and Cossío argued that with the rotation of the presidency in 2000, Mexico turned to a new constitutional order with a true separation of powers. They further argued that Congress and the Supreme Court began to make binding decisions and were not subordinated by the president. Mexico, they believed, was in a new era of constitutionalism in which an authoritarian government, or "Presidentialism," was unlikely to reappear any time soon.² They pointed to two important characteristics. On the one hand, the PRI's lack of ideological focus produced a flexible authoritarianism that allowed it to respond opportunistically to political forces without undermining the basic power structure. On the other hand, the Mexican president had become the supreme coalition builder.³ Unfortunately, they didn't envisage what would develop from these two characteristics, and disregarded constitutional culture.

In our opinion, these authors' trust that an authoritarian government is unlikely to reappear was misguided. In another work, Niembro has described the sophisticated way in which Mexican ruling elites with an authoritarian mentality exercise power as a form of authoritarian constitutionalism.⁴ Authoritarian constitutionalism's reliance on the constitution as a discourse explains why it is so important for Mexican political elites to have a written constitution and establish almost every public policy in it, while disregarding liberal democratic ideology.⁵

As the Mexican Constitution was amended more than seven hundred times, it became a large and opaque text. Moreover, political elites abandoned the conception of the Constitution as a nonbinding and aspirational document that expresses the promises of the Revolution and began talking about it as a binding document, at least when doing so was to their advantage. In this way, the Constitution helped them sustain a rule of law and democratic discourse with no serious commitment to democracy itself. Furthermore, theorists and practitioners guided the process with a minimalist conception of democracy

² Stephen Zamora and José Ramón Cossío, "Mexican Constitutionalism after presidencialismo," *International Journal of Constitutional Law* 4, no. 2 (2006): 411–412; *Contra* Jesús Silva Herzog Márquez, *El antiguo régimen y la transición en México*, 3rd ed. (Mexico City: Planeta, 2004), 150.

³ Zamora and Cossío, "Mexican Constitutionalism," 415–416.

⁴ Roberto Niembro Ortega, "Conceptualizing Authoritarian Constitutionalism," *VRÜ* 49, no. 4 (2016): 339–367.

⁵ Octavio Paz, *El Laberinto de la Soledad, Postdata, Vuelta al Laberinto de la Soledad* (Mexico City: FCE, 1994), 133–134; José Antonio Aguilar Rivera, *La geometría y el mito: un ensayo sobre la libertad y el liberalismo en México, 1821–1970* (Mexico City: FCE, 2010), 12.

that focused only on electoral rules.⁶ In fact, Mexico has invested a huge amount of resources in its electoral regime, including a specialized supreme electoral court and lower level courts, federal and local. Moreover, there is a high level of public financing for political parties.

According to the Third National Poll on Constitutional Culture made by the Universidad Nacional Autónoma de México (2017),⁷ in contrast to political elites, 90.5 percent of Mexicans say they know a little bit or nothing at all of the Constitution. This situation is disturbing because it implies alienation from constitutional values, procedures, and structures. For example, according to the same poll, only 56.5 percent of the people think they should obey the law, 62.2 percent think gay couples should have the same rights as non-gays, 47 percent think it is permissible to torture someone to make him confess that he raped a woman, 27.8 percent would not obey a majority rule if they do not agree with it, 25.8 percent think in some circumstances it is better to have a non-democratic government, and for 18.8 percent it does not matter if it is democratic or not.⁸

This high level of ignorance of the Constitution and alienation from the values, structures, and procedures it establishes for democracy give us a clue to the weakness of Mexican constitutional culture. Of course, a poll is not enough to support a robust conclusion, but it gives us a snapshot of what people actually think. If we take into account the poll results, it is urgent to think what is a constitutional culture, how can it be promoted, and what are the goals of having it.⁹ This is especially true if a constitutional culture, among other things, is fundamental for a constitution to work properly.¹⁰ In this chapter, we explain several relations between culture and a constitution and define constitutional culture as the active popular process of learning, understanding, and interpreting the values, structures, and procedures established in the Constitution in a non-legalistic way, with the goal of forming a popular habit and custom of demanding justification of governmental acts by political participation.

⁶ See Ricardo Becerra, Pedro Salazar, and José Woldenberg, *La mecánica del cambio político en México. Elecciones, partidos y reformas* (Mexico City: Cal y Arena, 2005), 19.

⁷ Héctor Fix Fierro, Julia Isabel Flores, and Diego Valadés, *Los mexicanos y su Constitución. Tercera Encuesta Nacional de Cultura Constitucional (Third National Poll on Constitutional Culture)* (Mexico City: IJ-UNAM, 2017), 60. This high percentage of ignorance of the Constitution has decreased somewhat since the first poll made in 2003. In 2003, 92.6 percent of the people said they know a little bit or nothing at all.

⁸ *Ibid.*, 87, 127, 195, 198.

⁹ On the culture of legality, see Pedro Salazar Ugarte, *Democracia y cultura de la legalidad* (Mexico City: INE, 2016), 33.

¹⁰ John Ferejohn, Jack N. Rakove, Jonathan Riley, eds., “Editors’ Introduction,” in *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2011), 2; Jason Mazzone, “The Creation of a Constitutional Culture,” *Tulsa Law Review* 40 (2005): 671–672; Hans Vorländer, “What Is a Constitutional Culture?,” in *Constitutional Cultures: On the Concept and Representation of Constitutions in the Atlantic World*, ed. Silke Hensel, Ulrike Bock, Katrin Dirksen, and Hans-Ulrich Thamer (Cambridge: Cambridge Scholars Publishing, 2012), 21, 27; Manuel Aragón, “La constitución como paradigma,” in *Teoría de la Constitución. Ensayos Escogidos*, ed. Miguel Carbonell (Mexico City: Porrúa, 2000), 118.

According to the classic Tylorian definition, culture is “that complex whole which includes knowledge, belief, arts, morals, law, custom and any other capabilities and habits acquired by man as a member a society.”¹¹ In this way, culture includes knowledge, customs, and acquired habits. As we will explain, constitutional culture is a process of learning, understanding, and interpreting the constitution, with the goal of forming a habit and custom of limiting the power of the state by political participation.

This chapter is divided into four parts. In the first part, we reflect on the goals of shaping a constitutional culture. In the second part, we develop a narrative of what the onstitution tells us about the culture of Mexican political elites. It is necessary to understand Mexican political elites’ culture and how they use the Constitution to figure out how to hinder popular constitutional culture. As we have said, throughout Mexico’s independent history political elites have been worried about having a written constitution, while the majority of people know nothing about it. Moreover, we explain the last threat to constitutional culture. In the third part, we defend popular participation in constitutional amendment procedures and popular interpretation of the Constitution in the public sphere as necessary means to shape a constitutional culture. Finally, we reflect on the lessons we can learn from the new Latin-American constitutionalism that incorporates mechanisms of political participation at the heart of the institutional political system.

In this sense, constitutional culture is necessarily linked with popular political participation. Constitutions of democratic states are instruments for democracy in which government requires the consent of the people. Further, as Tocqueville says, participation is the means by which citizens learn their laws and rules of administration, which are their rights and means to protect them, and shape their habits and customs.¹² In other words, we learn and understand our constitution through communication and social interaction.¹³

Finally, we have to keep in mind that shaping a constitutional culture is an open and incomplete dialectical process, with a strong tendency to preserve the status quo. Everywhere, citizens’ conformity is promoted¹⁴ and change is constrained by previous understandings.¹⁵ And, these processes are necessarily related to a particular context.¹⁶ In this sense, what we would say is closely connected with the Mexican context. Yet, though Mexico is not completely comparable to other countries, we hope our discussion will be valuable for readers elsewhere.

¹¹ Edward Burnett Tylor, *Primitive Culture* (London: Bradbury, Evans, and Co., 1871), 1.

¹² Alexis de Tocqueville, *Democracy in America* (Indianapolis, IN: Liberty Fund, 1835), 448–449.

¹³ J.M. Balkin, *Cultural Software: A Theory of Ideology* (New Haven, CT: Yale University Press, 1998), 5, 14.

¹⁴ Anthony G. Amsterdam and Jerome Brune, *Minding the Law* (Cambridge, MA: Harvard University Press, 2002), 231–233.

¹⁵ See Balkin, *Cultural Software*, 41.

¹⁶ See Müller, *Constitutional Patriotism*, 59. See Ferejohn, Rakove, and Riley, “Editors’ Introduction,” 10.

Constitutional Culture

Relations between culture and the constitution can be studied from different perspectives. Culture may be the object of regulation of a constitution, what some call cultural constitutional law.¹⁷ For example, article 2 of the Mexican Constitution points to culture as one of the criteria to identify Indigenous peoples, and article 4 grants all persons the right to culture.

A constitution may be regarded as a cultural product, which means that it is an expression of a culture.¹⁸ However, in plural societies there is more than one culture, so the constitution reflects the culture of several elites, different groups of civil society, communities, and more.¹⁹ Moreover, a constitution may work as a limit on cultural values²⁰ and help shape a constitutional culture, furthering mentalities according to its values.²¹ Finally, a constitution may be the object for a constitutional culture.

As a normative ideal, the object of a constitutional culture is the values, structures, and procedures established in the constitution. Even though we can distinguish groups of citizens, professionals and authorities' subcultures,²² in a democracy, constitutional culture is citizens' culture.

Among the theorists that consider the constitution the object of constitutional culture, we may distinguish those interested in the opinions, perceptions, or attitudes of the people toward the content or the function of the constitution²³ from those that define it as the *dialectic* between “extrajudicial beliefs about the substance of the constitution” and the judiciary,²⁴ or “the understandings of role and practices of argument that guide *interactions* among citizens and officials in matters concerning the constitution's meaning.”²⁵

¹⁷ Miguel Ángel Herrera, “Consideraciones sobre constitución y cultura,” in *Derecho Constitucional y Cultura*, ed. Francisco Balaguer Callejón (Madrid: Tecnos, 2004), 121.

¹⁸ Herrera, “Consideraciones,” 124; Peter Häberle, “La Constitución como cultura,” *Anuario Iberoamericano de Justicia Constitucional* 6 (2002): 178, 194; Roger Cotterrell, *The Sociology of Law: An Introduction* (New York: Oxford University Press, 1984), 24.

¹⁹ Cotterrell, *Sociology of Law*, 23; Rainer Arnold, “La contribución de los países de Europa Central y Oriental al desarrollo de una cultura constitucional europea,” in *Derecho Constitucional y Cultura*, ed. Francisco Balaguer Callejón (Madrid: Tecnos, 2004), 58.

²⁰ Modesto Saavedra López, “La constitución como objeto y como límite de la cultura,” in *Derecho Constitucional y Cultura*, ed. Francisco Balaguer Callejón (Madrid: Tecnos, 2004), 151.

²¹ Juan Fernando López, “Cultura y Derecho. Las dimensiones constitucionalmente relevantes de la cultura,” in *Derecho Constitucional y Cultura*, ed. Francisco Balaguer Callejón (Madrid: Tecnos, 2004), 215; see Herrera, “Consideraciones,” 125.

²² Gabriel A. Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Thousand Oaks, CA: Sage, 1989), 26; Ferejohn, Rakove, and Riley, “Editors' Introduction,” 10.

²³ See Fierro, Flores, and Valadés, *Los mexicanos y su Constitución*, 17, 18.

²⁴ Robert C. Post, “Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,” *Harvard Law Review* 117 (2003): 4, 8.

²⁵ Reva Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA,” *California Law Review* 94 (2006): 1323, 1325; Reva Siegel, “Community in Conflict: Same-Sex Marriage and Backlash,” *UCLA Law Review* 64 (2017): 5–7.

Moreover, constitutional culture is a process of learning, understanding, and interpreting. Learning about, understanding, and interpreting the constitution are important but difficult tasks. They are important because only when we know, understand and interpret the constitution may we rationally evaluate attitudes such as attachment,²⁶ apathy, or alienation toward it. Furthermore, if we know and understand the constitution we can use its processes and structures for our political struggles. It is a difficult task because our Constitution is opaque, very large, and disorganized. However, learning, understanding, and interpreting it is one of the best resources to change its encryption. In fact, to refuse to learn and understand it means we leave it in the hands of experts.²⁷

There is a different perspective on constitutional culture, according to which its' object is the ideology of constitutionalism.²⁸ In accordance with a democratic conception, constitutionalism means limiting the power of the state and empowering those who would otherwise be powerless.²⁹ Furthermore, it is an ideology that helps us critique the status quo and present a transformative proposal.³⁰ Accordingly, constitutional culture looks for citizens' internalization of constitutionalism.³¹

Why Constitutional Culture Matters

Shaping a constitutional culture is not just a heuristic goal, but also a means to empower citizens, a tool of action.³² To know, understand, and interpret the constitution allows citizens to use human rights and constitutional processes for their political and social struggles. Only by learning, understanding, and interpreting them can citizens use constitutional processes and structures. At the same time, participation generates new understandings and ways of thinking about the constitution. Through communication, citizens produce and spread culture that influences public officials.³³

In other words, shaping a constitutional culture through popular participation is an activity oriented to democratize power. To think about constitutional culture is to

²⁶ In our opinion, a constitutional culture does not seek an alliance to the constitution or to constitutionalism. If we speak of alliance, then we should talk about constitutional patriotism, see Müller, *Constitutional Patriotism*.

²⁷ Gabriel Méndez Hincapié and Ricardo Sanín Restrepo, "La constitución encriptada. Nuevas formas de emancipación del poder global," *Revista de Derechos Humanos y Estudios Sociales* 8 (2012): 113.

²⁸ See Ferejohn, Rakove, and Riley, "Editors' Introduction," 2, 4.

²⁹ Jeremy Waldron, "Constitutionalism: A Skeptical View," *NYU School of Law, Public Law Research Paper*, No. 10-87 (2012): 12–16, 25.

³⁰ Carlos de Cabo Martín, "El elemento utópico, ingrediente cultural del constitucionalismo," in *Derecho Constitucional y Cultura*, ed. Francisco Balaguer Callejón (Madrid: Tecnos, 2004), 55.

³¹ See Arnold, "La contribución de los países," 59.

³² See Balkin, *Cultural Software*, 16.

³³ *Ibid.*, 270, 280–281. See Post, "Fashioning the Legal Constitution," 8.

think how to empower the people against the government. In an authoritarian constitutionalism regime, public officials prefer to keep people ignorant about constitutional processes and structures, so they can use the constitution according to their wishes and convenience.

Moreover, constitutional culture prepares citizens to question the political function that a constitution fulfills in a particular context.³⁴ That is, constitutional culture is a citizens' tool to criticize and reflect about the defects, lack of efficacy, or fraudulent application of the constitution, such as when a liberal democratic constitution is used as a façade of democracy just to legitimize or stabilize an authoritarian regime. In this sense, constitutional culture develops a critical approach of self-reflection and self-discovery.³⁵

Furthermore, constitutional culture has the goal of forming a popular habit and custom of demanding justification of governmental acts by political participation.³⁶ This is the process of internalizing the ideology of constitutionalism. However, the important question is how to internalize the ideology of constitutionalism. This question is very relevant to Mexico, in which constitutionalism has been considered an issue for lawyers with focus on the higher/lower-level distinction,³⁷ disregarding the idea that a constitution becomes normative only with a specific kind of popular participation that demands justification of officials acts. Only in this way can the people internalize constitutionalism.³⁸

In a constitutional culture people live constitutionalism.³⁹ They are accustomed to limiting the power of the state, and they are empowered by political participation. Peoples' experience of constitutionalism is more important than knowing the content of the constitution.⁴⁰ The constitution is a tool to achieve constitutionalism.⁴¹ In this sense, for example, if a liberal democratic type of constitution is used for practical and authoritarian ideological functions, the people should be guided by the idea of constitutionalism to critique authoritarian practices or the constitution itself.

³⁴ Juan Carlos Velasco, "Patriotismo Constitucional y Republicanismo," *Claves de la Razón Práctica* 125 (2002): 33, 34.

³⁵ See Balkin, *Cultural Software*, 130.

³⁶ See Juan Carlos Velasco, "La fuerza pública de la razón. El papel de la deliberación en los procesos democráticos," in *Filosofía Política: entre la religión y la democracia*, ed. Guillermo Hoyos y Eduardo A. Rueda (Bogotá: Pontificia Universidad Javeriana, 2011), 78.

³⁷ José Ramón Cossío, *Dogmática Constitucional y Régimen Autoritario* (Mexico City: Fontamara, 2000); Alejandro Madrazo, "Estado de Derecho y Cultura Jurídica en México," *Isonomía* 17 (2002): 203–223.

³⁸ Jürgen Habermas, *Facticidad y validez: Sobre el derecho y el Estado democrático en términos de teoría del discurso* (Madrid: Trotta, 2000), 466.

³⁹ See Häberle, "La Constitución como cultura," 198; Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton, NJ: Princeton University Press, 1995), 112.

⁴⁰ See Mazzone, "The Creation of a Constitutional Culture," 694; Velasco, "Patriotismo Constitucional," 38.

⁴¹ J.M. Balkin, "The Declaration and the Promise of a Democratic Culture," *Widener Law Symposium Journal* 4 (1999): 167, 169.

The daily experience of constitutionalism is not only a commitment to abstract ideas but requires institutions, procedures, and practices.⁴² The experience of using these institutions, procedures, and practices shapes a constitutional culture.⁴³ In this way, a constitutional culture is an ongoing process shaped by political participation and not a one-time decision.⁴⁴ It is by political participation that citizens limit the power of the state,⁴⁵ and, therefore, become interested and learn about constitutionalism.⁴⁶

The habit and custom of political participation has a specific quality. It is the daily experience of exercising the right to justification,⁴⁷ demanding it for any official act. In this sense, a constitutional culture is a kind of a culture of justification: “a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.”⁴⁸

The culture of justification is opposed to a culture of authority. A culture of justification bases legitimacy of law on the quality of reason. Citizens are empowered to demand justification, and public officials are compelled to give reasons for their actions. These actions could be amending the constitution, passing a law, a judge’s ruling, or a momentary detention by a public official. However, a culture of justification becomes relevant in the everyday relationship between the administrative branch and citizens. In this sense, a culture of justification demands both, popular participation and public officials’ commitment to the rule of law, in accordance with the principles of an internal morality of law. In this sense, they are obliged to support their decisions by legal reasons.⁴⁹

On the contrary, in a culture of authority legitimacy is based on who issues the decision and because of fear of being coerced. In a culture of authority “the legitimacy and legality of governmental action is derived from the fact the actor is authorized to act,” while in a

⁴² See Velasco, “Patriotismo Constitucional,” 35; Andrew M. Siegel, “Constitutional Theory, Constitutional Culture,” *University of Pennsylvania Journal of Constitutional Law* 18 (2016): 1067, 1122; Kaarlo Tuori, “Democracy, Constitution and Culture,” in *Teoría Política II* (Madrid: Marcial Pons, 2012), 223, 229.

⁴³ Habermas, *Facticidad y validez*, 627, 628.

⁴⁴ Ibid., 466; J.M. Balkin, “The Declaration and the Promise,” 175; Carole Pateman, “Participation and Democratic Theory,” in *The Democracy Sourcebook*, ed. Robert A. Dahl, Ian Shapiro, and José Antonio Cheibub (Cambridge, MA: MIT Press, 2003), 41–43.

⁴⁵ Adam Tomkins, *Our Republican Constitution* (Portland, OR: Hart Publishing, 2005), 10.

⁴⁶ James S. Fishkin, “The Voice of the People,” in *The Democracy Sourcebook*.

⁴⁷ Rainer Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012).

⁴⁸ Ettiene Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights,” *South African Journal on Human Rights* 10 (1994): 31, 32.

⁴⁹ David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford: Oxford University Press, 2010), 278–288; David Dyzenhaus, “Proportionality and Deference in a Culture of Justification,” in *Proportionality and the Rule of Law*, ed. Grant Huscroft, Bradley W. Miller, and Grégorie Webber (Cambridge: Cambridge University Press, 2014), 234–258.

culture of justification it is not enough. A culture of justification requires rationality and reasonableness.⁵⁰

The Mexican Constitution as the Expression of Political Elites' Culture

We started this essay saying that Mexican constitutional culture is very weak. Instead we find that the Mexican Constitution is an expression of political elites' culture. In this understanding it is possible to get two different impressions. If we look superficially into the content of the Constitution, we can conclude that it is a liberal, social, and democratic culture. It establishes a high number of fundamental rights, including social, economic, and cultural rights, separation of powers and federalism, regulation of electoral processes, representative institutions, and popular participatory mechanisms.⁵¹

But, if we look at the details of those mechanisms or to the constitutional practice, we get a different picture, not compatible with the first.⁵² The main example of the aforementioned is constitutional amendment practice. Amendments are made by federal and state political elites because they have the power to present initiatives, carry out the legislative processes, and vote. Ordinary citizens are not part of the constitutional amendment process established in article 135 of the Constitution and usually do not get involved with them.⁵³ In its one hundred years, article 135 of the Mexican Constitution has not been amended to include any participatory mechanism,⁵⁴ even as the majority ignores how often the Constitution is amended.⁵⁵ This fact is striking if we take into account that with more than seven hundred constitutional amendments and its wide scope, the 1917 Constitution is something very different today. The actual amendment practice shows that there is a great distrust of majorities and citizens.⁵⁶

⁵⁰ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge, Cambridge University Press, 2013) 112, 113.

⁵¹ See Salazar Ugarte, *Democracia y cultura*, 37.

⁵² See Almond and Verba, *The Civic Culture*, 33.

⁵³ Article 135. The present Constitution may be added to or amended, but to become a part of it, such additions or amendments require the approval of the Congress of the Union through the vote of two-thirds of the congressmen present, and the approval, thereafter, of the majority of the state legislatures. The Congress of the Union or the Permanent Commission, as the case may be, shall count the votes of the legislatures and shall make the declaration to announce that the additions or amendments in question have been approved.

⁵⁴ A participatory mechanism does not exclude every deliberative filter in a parliamentary procedure; see Sanford Levinson, "Designing an Amendment Process," in *Constitutional Culture and Democratic Rule*, 278.

⁵⁵ According to the Third National Poll on Constitutional Culture made by *Universidad Nacional Autónoma de México* (2017), 31.0 percent of the people thinks the constitution is amended rarely, and 23.4 percent with some frequency. See Fierro, Flores, and Valadés, *Los mexicanos y su Constitución*, 54.

⁵⁶ Héctor Fix-Fierro, "¿Por qué se reforma tanto la Constitución mexicana de 1917? Hacia la renovación del texto y la cultura de la Constitución," in *Cien Ensayos para el Centenario*, ed. Gerardo Esquivel, Francisco Ibarra Palafox, and Pedro Salazar Ugarte (Mexico City: Instituto Belisario Domínguez del Senado de la República, 2017), 151.

A prominent example of this constitutional practice is the approval of an amendment to the Mexican Constitution regarding private investment in oil and hydrocarbons. A sensitive issue considering article 27 of the Constitution established public ownership of oil and hydrocarbons, and was considered one of the Mexican Revolution greatest achievements. This amendment was negotiated by a small group of congressmen, government leaders, and party leaders outside Congress in what has been called the Pact for Mexico (*Pacto por México*). The *Pacto por México* was a political agenda set by the three major political parties when Enrique Peña Nieto came to office. They put in place a board that negotiated and wrote up the proposed laws. There was no transparency in these discussions; the participants simply submitted the proposal to Congress to be approved.

According to article 135 of the Constitution, the amendment required the approval of a supermajority in both Houses and a majority of state legislatures. Even though this procedure is theoretically rigid, the constitutional amendment was approved by the House of Representatives the next day after receiving it from the Senate, and the state legislatures approved it in just a few days.⁵⁷ Moreover, according to the members of the left opposition, there were some irregularities in the committees of the House.⁵⁸ And some state legislatures approved the amendment within hours after receiving it without any further proceeding.⁵⁹

After it passed the state legislatures, Congress made a public declaration of its constitutionality. Some days later, the president, congressmen from PRI, and members of the right-wing party defended the constitutional amendment in a big TV presentation, arguing that it would further the development of the country and make electricity and combustibles cheaper. The ruling elite argued that the amendment was inevitable under current conditions and highlighted that the amendment respected all the rules established by the Constitution, so it was constitutional.

Another example of this constitutional practice is the incorporation of the right to public consultation and the right to run as an independent candidate. In the case of public consultation, the amendment established several restrictions that severely limited the importance of public consultations. Article 35 of the Constitution requires public consultation to be requested by at least 2 percent of the citizens, but limits the object of the consultation in the following way: public consultation cannot deal with limiting human

⁵⁷ Animal Político Editorial Staff, “Reforma energética rompe récord en tiempo de aprobación constitucional,” *Animal Político*, December 16, 2013, <http://www.animalpolitico.com/2013/12/en-83-horas-la-reforma-energetica-es-constitucional-17-congresos-la-avalan/#axzz2r5KR9aMK>.

⁵⁸ Radio Fórmula Editorial Staff, “Violaciones a reglamento sustenta amparo reforma energética: PRD,” *Noticias Radio Fórmula*, January 8, 2014, <http://www.radioformula.com.mx/notas.asp?Idn=381947>.

⁵⁹ It is worth noting that this fast-track processing of constitutional amendments has become a trait of the current government; see CNN México Editorial Staff, “La reforma energética avanza en los Congresos estatales,” *CNN México*, December 13, 2013, <http://mexico.cnn.com/nacional/2013/12/13/reforma-energetica-aprobacion-congresos-estatales>; La Jornada Editorial Staff, “Entre protestas, seis congresos estatales refrendaron la reforma energética,” *La Jornada*, December 14, 2013, <http://www.jornada.unam.mx/2013/12/14/politica/009n1pol>.

rights, the principles of article 40, electoral procedures, revenues and expenditures, and national security and the armed forces. The Supreme Court is in charge of reviewing the constitutionality of the consultation beforehand. Because these excluded topics are related to almost every public policy, there has not been a single consultation considered constitutional. The most striking consultation denial was the one massively required after the approval of the aforementioned amendment establishing private investment in oil and hydrocarbons. In the case of the right to run as an independent candidate, article 116 delegates regulation of independent candidates to state legislatures that have, in practice, narrowly restricted them.

A third, and more recent, example is the creation of a national anticorruption system in 2015. The system was introduced by a constitutional amendment some months after the widely publicized corruption scandal of President Peña Nieto. A prominent journalist published a detailed report of the very expensive “white house” of the president built by one of the main construction companies hired by the government.⁶⁰ Even though civil society pushed for this constitutional amendment, the timing of its approval was no coincidence. The political purpose of the publication was clear in the transitional articles. These articles established that the amendment would be in force 180 days after its publication, once the laws are passed. In other words, the constitutional amendment was an immediate response to the crisis derived from the scandal, without any real intention to implement it. The anticorruption public prosecutor has not yet been appointed. Moreover, the journalist who published the report was fired some months after the publication with no reason.

Also independent institutions such as the Electoral Court are being attacked. The last electoral judges’ designation was full of constitutional challenges. Once the Supreme Court and the Senate made the appointments fulfilling a constitutional process, Congress amended the legal provision that established a judge’s tenure by granting the judges a longer term in office. This change was seen as a threat to their judicial independence. The case arrived to the Supreme Court alleging a violation to judges’ independence, and the Court in a 6-to-5 ruling declared the provision constitutional.

In our opinion, the normative and practical exclusion of citizens from the amendment procedure shows the distrust that political elites have of the people,⁶¹ and the lack of interest in making the Constitution known to them. What matters to political elites is the Constitution being effective for *their* purposes,⁶² making people into objects of control or governance.⁶³ In other words, the continuous amendments to the Mexican Constitution

⁶⁰ Aristegui Noticias Editorial Staff, “La casa blanca de Enrique Peña Nieto (investigación especial),” *Aristegui Noticias*, November 9, 2014, <http://aristeguinoticias.com/0911/mexico/la-casa-blanca-de-enrique-pena-nieto/>.

⁶¹ See Levinson, “Designing an Amendment Process,” 276.

⁶² Robert M. Cover, “Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4, 12–17.

⁶³ See Balkin, *Cultural Software*, 27.

exemplify that constitutional rigidity, in this case, is not a mechanism to limit the power of partisan majorities, but an obstacle for people to know the Constitution. Additionally, the multiplicity of amendments and their fast approval forbid robust social deliberation about their necessity and merits, and in that way, they hinder constitutional culture.⁶⁴ Furthermore, the lack of formal and informal popular participation indicates that this process is not a democratic mechanism.⁶⁵

Finally, we should note the wide scope and excessive details established in the Constitution,⁶⁶ its lack of systematization, and some contradictory rules.⁶⁷ The Mexican Constitution regulates a huge number of institutions: for example, judicial review processes, autonomous municipalities, electoral regime, indigenous rights, agrarian rights, transparency regime, budget and accountability institutions, relations between the state and church, judicial careers, ombudsperson, oil and hydrocarbon production, and many more. These features make the Constitution an opaque text very difficult for the average Mexican to understand.

In fact, one of the duties of the Supreme Court is to systematize the Constitution by interpreting it. Sometimes this task is very difficult because some amendments that are already part of the Constitution have not come into force according to the transitory articles. For example, the penal reform of 2008 required an eight-year period before coming into force. However, all rights and duties are already in the text. Moreover, the delay of the coming into force of constitutional amendments has become a common practice. In this way, the Mexican Constitution is an encrypted text for a few experts in constitutional law, who have an unjustified power over other people.⁶⁸ In a few words, the Mexican Constitution and the practice of amending it has been used by Mexican political elites to hinder popular constitutional culture.

The Last Threat to Constitutional Culture

Unfortunately, after one hundred years of the Mexican Constitution, we still live between a culture of authority and a culture of authoritarianism. Nowadays, in most Mexican

⁶⁴ See Ana Micaela Alterio, “La relación entre rigidez y supremacía constitucional. Un análisis a la luz de las reformas constitucionales en México,” *Revista del Centro de Estudios Constitucionales* 4 (2017): 209–231.

⁶⁵ Xenophon Contiades and Alkmene Fotiadou, “Models of Constitutional Change,” in *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, ed. Xenophon Contiades (New York: Routledge, 2013), 432–433.

⁶⁶ See Tom Ginsburg, “Constitutional Specificity, Unwritten Understandings and Constitutional Agreement,” *Public Law and Legal Theory Working Papers*, No. 330, (2010): 69, 77, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1074&context=public_law_and_legal_theory.

⁶⁷ For example, article 73, XXI, a) and article 116, IV, o) of the Constitution grant to federal and state officials, at the same time, the power to establish electoral crimes.

⁶⁸ Carlos María Cárcova, *La opacidad del derecho* (Madrid: Trotta, 2006), 160.

cities it is common to have a high number of military “enforcing” the law. This, against articles 21 and 129 of the Constitution—while at the same time, police officers commonly torture many of those arrested in a context of general impunity.⁶⁹ For most Mexican citizens, law is imposed by force, and many times entails violating their fundamental rights, the latter a clear case of a culture of authoritarianism.⁷⁰

In fact, the last threat for a constitutional culture, which may be the starting point of the consolidation of an authoritarian order, is the recently approved Law of Internal Security in December of 2017. This law completely militarizes the public safety in Mexico. It authorizes the executive branch to use the military as a regular force for public safety instead of the police—this, after ten years of a “war on drugs” that left thousands of people killed and missing.⁷¹ As it is well known, the Mexican police are poorly equipped and not well-trained. They have been accused of massive violations on human rights, and many authors consider them part of the highly-corrupted system. In this sense, the police are incompetent to deal with regular security, and even less capable of dealing with the drug cartels emergency.

As a response to the security crisis in 2006, President Felipe Calderon, using a Supreme Court ruling of 1996 as the legal source, issued an administrative order to use the armed forces as law enforcement forces. Since then, military corps began to substitute police officers as the regular law enforcement officers. In 2010, President Calderon urged to have a law that regulates the military corps as public safety institution. Even without such law, during 2016, there were 3,386 soldiers in the streets taking care permanently of the public safety.⁷²

The constitutional debate regarding the possibility of using the armed forces as public safety forces began with the popular movement “Movimiento por la paz con Justicia y Dignidad.” According to this social movement, articles 21 and 129 of the Mexican Constitution prohibit armed forces to substitute for the police. Article 21 establishes that public safety is a civil duty, and article 129 establishes that armed forces in times of peace should be limited to disciplinary duties. In fact, the original understanding of article 129 indicates it intended to allow the use of armed forces

⁶⁹ See J.A. Le Clercq Ortega and Gerardo Rodríguez Sánchez. (coord.), “IGI Índice global de impunidad 2017. Dimensiones de la Impunidad Global,” *Centro de Estudios sobre impunidad y justicia (CESIJ), Universidad de las Américas Puebla y UDLAP Jenkins Graduate School*, <http://www.udlap.mx/cesij/files/IGI-2017.pdf>, last accessed May 15 2018.

⁷⁰ See Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 112.

⁷¹ See “Situación de Derechos Humanos en México,” Comisión Interamericana de Derechos Humanos, OEA, Doc 44/15, December 31, 2015. See also Centro PRODH: Centro de derechos humanos Miguel Agustín Pro Juárez A.C., *Perpetuar el modelo fallido de seguridad. La ley de seguridad interior y el legado de una década de políticas de seguridad en México contrarias a los derechos humanos* (Mexico City: Centro Prodh, 2017), http://www.centroprodh.org.mx/index.php?option=com_docman&task=doc_details&gid=226&Itemid=288&lang=es.

⁷² “Situación de Derechos Humanos en México”: Ibid.

only under very limited circumstances. However, the Supreme Court ruling of 1996 interpreted article 129 to allow armed forces to help civil authorities if requested by the latter.

As many NGOs documented during these years, the army is not prepared to justify its actions, as a well-trained police should do. So, after ten years of the armed forces being accused of human rights violations, in 2017 the secretary of defense publicly declared that if there is no law that protects them the army will go back to their barracks. After several protest and public declarations against the law by the UN High Commissioner for Human Rights, the ombudsperson, and human rights advocates, in December 2017 Congress approved the law. Two days after its approval, the secretary of defense thanked Congress for passing the law and said he will respect the final decision of the Supreme Court on its constitutionality.

Several NGOs, constitutional scholars, and civil society argued against the law, focusing on articles 21 and 129, which, as we already mentioned, establish that public safety is a duty of civilians.⁷³ In this public discussion, articles 21 and 129 are interpreted as a prohibition of militarizing public safety. There is no doubt this is one of the purposes of these articles. However, they have another unnoticed feature. The Constitution puts civilians in charge of public safety duties because it is the bridge for a culture of justification as opposed to a culture of authority. In this sense, the discussion about the constitutionality of the Law of Internal Security begs the question of what type of culture we want to pursue. It is not just an interpretative discussion about articles 21 and 129; it is a discussion about the culture we want for our country.

We want to clarify we are not arguing in favor of leaving the police in charge of public safety with no change in their practices and structures. Of course, the Mexican police has failed to prevent and persecute crimes effectively while respecting human rights. They urgently need a profound reform. However, at this critical moment in Mexico, after ten years of a failed strategy that involved thousands of people killed and missing, we are deciding which path we want to pursue. Between a culture of authority and probably authoritarian, or a change to a culture of justification. For sure, the latter will take time, money, and great effort to reform the police. However, we already have let ten years pass, and the former has been a complete failure. Moreover, the Law of Internal Security poses a real threat to political participation necessary to shape a constitutional culture. The presence of military forces in the street is a way of intimidation that hinders public protest. In short, it is an effective mechanism to dissuade political participation.⁷⁴

⁷³ See a complete report at www.seguridadsinguerra.org.

⁷⁴ “We still miss 43” is one of the social mobilizations’ slogans regarding forty-three disappeared students during a protest, presumably by the army.

Amendment Procedure, Popular Interpretation, and Constitutional Culture

In shaping a constitutional culture, educational institutions have an important role.⁷⁵ As we know, education and schools are one of the main means to spread an ideology and democratic culture.⁷⁶ But the most effective means for shaping a constitutional culture is popular participation through institutions and in the public sphere.

One of these fundamental mechanisms to shape a constitutional culture is deliberative participation in constitutional amendment procedures,⁷⁷ such as open meetings, participatory forums, public hearings, popular initiatives, referenda,⁷⁸ or deliberative polling.⁷⁹ Participatory constitutional amendments would allow the citizenry to learn and understand the content of the Constitution, and it is a way of interaction between public opinion and institutions.⁸⁰ Participatory constitutional amendments have similar qualities to the ones Tocqueville found in juries as a republican institution that “places the real direction of society in the hands of the governed or of a portion of them, and not in the hands of those governing.”⁸¹ For Tocqueville, a jury had the following qualities: it serves to give the mind of all citizens a part of the habits of mind of the judge. It spreads in all classes respect for the thing judged and for the idea of right, teaches men the practice of equity and not to retreat from a responsibility for their own actions, and makes citizens feel they have duties to fulfill toward society and that they belong in their government. It serves to form the judgment and to augment the natural enlightenment of the people. It is a free school, where each juror comes to be instructed about his rights and enters into daily communication.⁸² In our opinion, participatory constitutional amendments could turn into a free school if they were designed correctly.

Education through participation needs deliberation.⁸³ Deliberation can be achieved by different institutional mechanisms, such as two votes with time between them for

⁷⁵ See Häberle, “La Constitución como cultural,” 198; see also Cover, “Nomos and Narrative,” 66; Jack Crittenden and Peter Levine, “Civic Education,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2016 Edition), <https://plato.stanford.edu/archives/win2016/entries/civic-education/>.

⁷⁶ Hugh Collins, *Marxism and Law* (New York: Oxford University Press, 1982), 50; Axel Honneth, “La educación y el espacio público democrático. Un capítulo descuidado en la Filosofía Política,” *Isegoría* 49 (2013): 377–395.

⁷⁷ Siegel, “Constitutional Culture, Social Movement Conflict,” 1339.

⁷⁸ Gabriel Negretto, “Constitution-Making in Comparative Perspective,” *Oxford Research Encyclopedia of Politics* (July 2017): 17–19.

⁷⁹ James Fishkin and Gombojav Zandanshatar, “Deliberative Polling for Constitutional Change in Mongolia: An Unprecedented Experiment,” *Constitution Net*, September 20, 2017, <http://www.constitutionnet.org/news/deliberative-polling-constitutional-change-mongolia-unprecedented-experiment>.

⁸⁰ See Habermas, *Facticidad y validez*, 374, 375; Pateman, “Participation and Democratic Theory,” 46.

⁸¹ See Tocqueville, *Democracy in America*, 445.

⁸² *Ibid.*, 448, 449; Alexandra D. Lahav, “The Jury and Participatory Democracy,” *William and Mary Law Review* 55 (2014): 1036–1038.

⁸³ The Ireland constitutional convention in 2012–2014 is a good example. See David M. Farrel, Clodagh Harris, and Jane Suiter, “Bringing People into the Heart of Constitutional Design: The Irish Constitutional

deliberation, or the requirement of electing a new decision-maker to approve the amendment.⁸⁴ The idea is to incorporate popular participation provided with information and time to deliberate.⁸⁵ In comparative constitutional law there are very useful examples of how to design a participative and deliberative mechanism. For example, design of referendums need to avoid an elite's manipulation and write the question precisely. To incentivize mobilization, it is necessary to avoid a high percentage for approval, and there should be enough time to deliberate.⁸⁶

Beyond participation in constitutional amendment procedures, Mexico needs a new narrative that supports popular interpretation of the Constitution in the public sphere.⁸⁷ In Mexico popular interpretation of the Constitution has been disregarded or openly opposed. There is the idea that the Constitution is a body of laws interpretable only by experts and from which citizens are excluded. In shaping this belief legal academia has played an important role. In our tradition, there are two influential strands regarding popular interpretation of the Constitution. Some theorists are indifferent to popular interpretation of the Constitution while others are opposed to it. In fact, it is very difficult to find any defense of popular constitutionalism by Mexican scholars. In the last years, we have argued in favor of popular constitutionalism.⁸⁸ However, our constitutional law discussions are mostly court-centered.

Popular interpretation of the Constitution is an open and incomplete process that requires active participation of the citizens. Conflict and disagreement about its content and function is foreseeable,⁸⁹ but conflict and disagreement generate deliberation, social mobilization, and the creation of civil associations.

Convention for 2012–14,” in *Participatory Constitutional Change: The People as Amenders of the Constitution*, ed. Xenophon Contiades and Alkmene Fotiadou (New York: Routledge, 2017), 131.

⁸⁴ Amar, “Popular Sovereignty and Constitutional Amendment,” 111; Francisco J. Laporta, *El imperio de la ley. Una visión actual* (Lugar: Trotta, 2007), 225; Xenophon Contiades and Alkmene Fotiadou, eds., “The People as Amenders of the Constitution,” in *Participatory Constitutional Change, The People as Amenders of the Constitution*, ed. Xenophon Contiades and Alkmene Fotiadou (New York: Routledge, 2017), 14.

⁸⁵ Contiades and Fotiadou, “The People as Amenders of the Constitution,” 19; Alterio, “La relación entre rigidez y supremacía constitucional.”

⁸⁶ Contiades and Fotiadou, “The People as Amenders of the Constitution,” 16, 25, 26. On Greece experience, see Alkmene Fotiadou, “The Role of the People in Constitutional Amendment in Greece: Between Narratives and Practice,” in *Participatory Constitutional Change, The People as Amenders of the Constitution*, ed. Xenophon Contiades and Alkmene Fotiadou (New York: Routledge, 2017), 131.

⁸⁷ As Contiades and Fotiadou explain, to understand models of constitutional change we need to understand correlations between the amending process, political system, constitutional ethos, and legal culture, see Xenophon Contiades and Alkmene Fotiadou, “Models of Constitutional Change,” in *Engineering Constitutional Change, A Comparative Perspective on Europe, Canada and the USA*, ed. Xenophon Contiades (New York: Routledge, 2013), 441.

⁸⁸ Ana Micaela Alterio and Roberto Niembro Ortega, *Constitucionalismo popular en Latinoamérica* (Mexico City: Porrúa, 2013); Roberto Niembro, “Una mirada al constitucionalismo popular,” *Isonomía* 38 (2013): 191–224.

⁸⁹ Ferejohn, Rakove, and Riley, “Editors’ Introduction,” 14. Siegel, “Constitutional Culture, Social Movement Conflict,” 1329.

Through deliberation, it is possible to learn and understand a constitution with ambiguous and vague terms, as well as the structures and processes it establishes. In fact, constitutional clauses do not have only one meaning, and they relate in complex ways. In other words, learning and understanding the constitution is done by a reflective process of deliberation.⁹⁰ Through deliberation, we learn the origin of constitutional clauses, possible interpretations, how they relate to each other, and what purposes they are established for. In our opinion, before any processes of deliberation, not even the best constitutional law professor could say she found the right answer. It is by a deliberative process that the interpreter gathers information, classifies it, and elaborates on it; for example, we learn how it is applied in specific cases and what the public opinion is.⁹¹ Moreover, through deliberation the people help establish what the constitution means,⁹² accomplishing a rational, and not only emotional, respect for the constitution. In democracy, the constitution motivates us because it is ours, interpreted through a rational debate.⁹³

This does not mean constitutional interpretation is limited to the constitutional text.⁹⁴ The language of the constitution is a point of departure that in some degree constrains constitutional debates, but it is not an unchangeable text, and its interpretation is disputable.⁹⁵ In this way, popular interpretation of the constitution goes beyond the constitutional text. Otherwise, political struggles are formalized and reduced to the terms established by legal experts.⁹⁶ If this were to be the case, power would remain on the ones who participate in constitutional amendment procedures and with the judicial branch being the only authority to establish and interpret the constitution.⁹⁷

We want to stress the importance of the complementarity between participatory constitutional amendments and participation in the public sphere at shaping public opinion. Shaping a constitutional culture requires both. On the one hand, even in countries such as Mexico with a high rate of constitutional amendments, habits of discussing and interpreting the constitution are acquired by daily participation. Only a constant communication and participation can foster a constitutional culture.⁹⁸ On the other hand, participation in the public sphere is not enough, if there are no institutional mechanisms that oblige public officials to dialogue with the people⁹⁹ and that guarantee safe

⁹⁰ Habermas, *Facticidad y validez*, 399.

⁹¹ Bernard Manin, "On Legitimacy and Political Deliberation," *Political Theory* 15, no. 3 (August 1987): 349–350; Habermas, *Facticidad y validez*, 372, 420.

⁹² Siegel, "Constitutional Culture, Social Movement Conflict," 1341.

⁹³ J.M. Balkin, "The Declaration and the Promise of a Constitutional Culture," 167, 179.

⁹⁴ Ferejohn, Rakove, and Riley, "Editors' Introduction," 8, 9, 24.

⁹⁵ Müller, *Constitutional Patriotism*, 57.

⁹⁶ Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993): 18, 26–27.

⁹⁷ See Méndez Hincapié and Sanín Restrepo, "La constitución encriptada," 110, 111.

⁹⁸ Balkin, *Cultural Software*, 90.

⁹⁹ See Robert Post, *Citizens Divided* (Cambridge, MA: Harvard University Press, 2014), 34–36.

conditions of participation. The existence of institutional mechanisms allows people to forge constitutional interpretation, and empowers citizens to have an impact on the final decision, promoting the belief that they should participate in constitutional amendments and in the public sphere.

Lessons from Latin-American Constitutionalism

We have argued for deliberative participation as a necessary means to shape a constitutional culture. We conclude by reflecting on what lessons we can learn from the new Latin-American constitutionalism (NLC), which incorporates mechanisms of political participation at the heart of the institutional political system.¹⁰⁰ The NLC is an example of both reaction and response to deep constitutional and democratic crises. Facing exclusive and illegitimate political systems, the constitutional processes of Venezuela (1999), Ecuador (2008), and Bolivia (2009)¹⁰¹ were enacted with the stated purpose of solving the political and social marginalization of certain groups (especially Indigenous people groups¹⁰²), as well as social inequality resulting from the application of neoliberal policies, particularly during the 1980s and 1990s.¹⁰³ Likewise, their purpose was to overcome the concept of a constitution as power limiting and to conceive it as a democratic formula where the constituent power expresses its will.¹⁰⁴

As for its constitutional model, we can point to some commonalities, especially because they all are based on the idea of citizen participation, which is the heart of their institutional political system. Participation goes far beyond the constituent act or the election of representatives, since it perpetuates along the constitutional texts in areas such as the popular, legislative, and constitutional initiatives or the approving, consultative, recall,

¹⁰⁰ See Francisco Palacios Romeo, “La reivindicación de la polis: crisis de la representación y nuevas estructuras constitucionales de deliberación y participación en Latinoamérica,” in *Materiales sobre neoconstitucionalismo y nuevo constitucionalismo latinoamericano*, ed. Claudia Storini and José Francisco Alenza García (Navarra, Spain: Thomson Reuters Aranzadi, 2012), 147, 177.

¹⁰¹ We will refer to these constitutions as part of the NLC as long as their creation processes have been described as “ground-breaking,” “transformative,” or “re-foundational.” See Roberto Viciano Pastor and Rubén Martínez Dalmau, “Fundamento teórico del nuevo constitucionalismo latinoamericano,” in *Estudios sobre el nuevo Constitucionalismo Latinoamericano*, ed. Roberto Viciano Pastor (Valencia: Tirant lo Blanch, 2012), 11, 30; Boaventura de Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur* (Lima: Siglo del Hombre Editores, 2010), 85.

¹⁰² Roberto Gargarella and Christian Courtis, *El nuevo constitucionalismo latinoamericano: promesas e interrogantes* (Santiago: United Nations ECLAC, 2009), http://www.palermo.edu/Archivos_content/derecho/pdf/Constitucionalismo_atinoamericano.pdf.

¹⁰³ Viciano Pastor and Martínez Dalmau, “Fundamento teórico del nuevo constitucionalismo latinoamericano,” 21–22.

¹⁰⁴ *Ibid.*, 15.

and abrogative referendums.¹⁰⁵ It is also reflected in public administration citizen control mechanisms¹⁰⁶ and in the recognition of forms of communitarian democracy developed by Indigenous peoples.¹⁰⁷ Finally, it is not limited to formal institutions, but also arises from provision of informal participation mechanisms such as the right of resistance.¹⁰⁸ In short, we find in the NLC an express willingness to “transcend elite constitutionalism towards a popular constitutionalism.”¹⁰⁹

However, other views of the same constitutions cast doubt on the effectiveness of the one stated above. Some scholars emphasize that it is difficult to expect development of wide citizen participation with an organization of power that is politically concentrated and territorially centralized.¹¹⁰ These remarks, plus the political practice that has developed in these countries in recent years, are what have led scholars to describe Venezuela, Ecuador, and Bolivia as cases of populism in a context of lack of constitutional culture.¹¹¹

Thus, the instrumental use of legislation, the concentration of power in the executive, the destruction of institutions that generated some control, and the restrictions on certain fundamental freedoms (in particular freedom of speech)¹¹² have forced even the original advocates of the model to become critics.¹¹³ In the cases of Venezuela and Ecuador,

¹⁰⁵ For example, art. 70 of the Venezuelan Constitution. In Ecuador, articles 103–113; Article 11 of Bolivian Constitution; see Gerardo Pisarello, “El nuevo constitucionalismo latinoamericano y la constitución venezolana de 1999: balance de una década,” *Sin Permiso* 1 (November 2009): 10.

¹⁰⁶ Like the creation of the “Citizen Power” in the constitution of Venezuela (Title V, Chapter IV), the “Power of Transparency and Social Control” in the 2008 Ecuadorian (Fifth Chapter, Title IV), and the function of “Participation and social control” in the 2009 Bolivian (articles 241 and 242). Only the last one is outside the institutions of the state and recognized as a communitarian and circumstantial organization of the people. See Albert Noguera Fernández, *El Sujeto Constituyente. Entre Lo Viejo y Lo Nuevo* (Madrid: Trotta, 2017) 144–145.

¹⁰⁷ See Rodrigo Uprimny, “The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges,” *Texas Law Review* 89 (2011): 1595; see also Sousa Santos, *Refundación del Estado en América Latina*, 118–122, in what is referred as intercultural democracy.

¹⁰⁸ Considered expressly in article 98 of the Ecuadorian constitution.

¹⁰⁹ Viciano Pastor and Martínez Dalmau, “Fundamento teórico del nuevo constitucionalismo latinoamericano,” 42; as expressed by Detlef Nolte and Almut Schilling-Vacaflor, eds., “Introduction: The Times They Are a Changin’: Constitutional Transformations in Latin America since the 1990s,” in *New Constitutionalism in Latin America. Promises and Practices* (London: Ashgate Publishing, 2012), 3, 19: “the adoption of the new constitutions was part of bottom-up process, including legal mobilization, and was among the central demands of social movements and citizens that were discontent with the previous social and political order.”

¹¹⁰ See Roberto Gargarella, *Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution* (New York: Oxford University Press, 2013), 172–177.

¹¹¹ See Ana Micaela Alterio, “El constitucionalismo popular y el populismo constitucional como categorías constitucionales,” in *Constitucionalismo Progresista: Retos y Perspectivas. Un homenaje a Mark Tushnet*, coords. Roberto Gargarella and Roberto Niembro Ortega (Mexico City: IJ-UNAM, 2016).

¹¹² Carlos de la Torre and Cynthia J. Arnson, eds., “Introduction: The Evolution of Latin American Populism and the Debates over Its Meaning,” in *Latin American Populism in the Twenty-First Century* (Washington, DC: Woodrow Wilson Center Press/Johns Hopkins University Press, 2013), 1, 4.

¹¹³ See César Rodríguez-Garavito, “Los derechos humanos y la ‘nueva’ izquierda latinoamericana,” *Open Democracy*, March 12, 2014, <https://www.opendemocracy.net/openglobalrights-blog/césar-rod%C3%ADguez-garavito/los-derechos-humanos-y-la-“nueva”-izquierda-latinoame>; Boaventura de Sousa Santos, “¿La Revolución

“people power tends to be invoked or cited, as an accompaniment or as acclamation, but not as autonomous power . . .”¹¹⁴ In this sense, Negretto explains that amongst all mechanisms of citizen participation, the only ones that have become effective are those that have a purely plebiscitary and anti-deliberative impact, such as the referendum.¹¹⁵

In the case of Venezuela, the 1999 Constitution had two effects: it weakened the legislative branch and transferred decision-making power to the executive, and it established direct ratification power in the people, without any intermediation. As a result, participation was considered within a centralistic perspective,¹¹⁶ wherein the leader is the architect of the people’s unity, with whom there is a hierarchical relation. In this approach, the source of the people is external and its unity fragile,¹¹⁷ which makes it difficult to talk about empowerment of people and limitation of power.

In this sense, the NLC experience teaches us that it is not enough to argue for participatory democracy, but for bottom-up democratic participation. It urges us to think about the possibility of political participation that goes beyond the functions of expression and political legitimization; rather participation should focus on the aspects of deliberation, shaping power, and control.¹¹⁸ In fact, without bottom-up participatory mechanisms of a deliberative kind and intermediate institutions, participation would not further a constitutional culture and would help to legitimize an antipopular, authoritarian constitutionalist regime. The challenge is open.

Conclusion

Unfortunately, after one hundred years of the Mexican Constitution, we have not been able to shape a constitutional culture. In fact, we lack a clear understanding of what this means or what direction we should pursue. However, it is a good moment to reflect collectively on what has been done wrong and what we need to do in the immediate future.

ciudadana tiene quién la defienda?” *Diario Público España*, May 9, 2014, <http://blogs.publico.es/espejos-extranos/2014/05/09/la-revolucion-ciudadana-tiene-quien-la-defienda/>.

¹¹⁴ Roberto Gargarella, “El ‘nuevo constitucionalismo latinoamericano’: Un constitucionalismo que no termina de irse” (working paper, ITAM’s faculty seminar, February 4, 2015), 25.

¹¹⁵ Gabriel Negretto, “El populismo constitucional en América Latina. Análisis crítico de la Constitución Argentina de 1949,” in *De Cádiz al siglo XXI. Doscientos años de constitucionalismo en México e Hispanoamérica (1812–2012)*, coords. Adriana Luna-Fabritius, Pablo Mijangos y Gonzalez, and Rafael Rojas Gutierrez (Mexico City: Taurus, 2012), 345, 370.

¹¹⁶ In this sense, the issues to discuss are the ones that government is interested in; all broadcasting and media are dominated by the government; participation mechanisms are activated in order to prove popular support to the leader, independently of the issue in question. In other words, participation has an instrumental character that pretends to legitimize an act of government.

¹¹⁷ Noguera, *El Sujeto Constituyente* 101–109.

¹¹⁸ Claudia Zilla, “El acceso al poder, procesos electorales y partidos políticos,” *Ius Constitutionale Commune en América Latina y las Estructuras del Estado* (Annual Seminar, Max Planck Institute for Comparative Public Law and International Law, December 6, 2016).

This chapter contributes to this collective enterprise, proposing a clear understanding of constitutional culture and a participatory path to achieve it.

Some legal scholars have focused on legal elites as motors of change disregarding popular communication and social learning; however, this path has not achieved any overall improvement. The good news is that there are alternative models that may stop the tendency of authoritarianism, but we need to take responsibility to carry out them. We need to work for a constitutional culture in which we are the agents and not its puppets.¹¹⁹

¹¹⁹ See Balkin, *Cultural Software*, XI.

